STATE OF MICHIGAN

COURT OF APPEALS

RIMA TRAKHTENBERG,

Plaintiff-Appellant,

v

JACOB TRAKHTENBERG,

Defendant-Appellee.

UNPUBLISHED
October 19, 2001

No. 224600
Oakland Circuit Court
LC No. 94-482811-DM

Before: Cooper, P.J., and Sawyer and Owens, JJ.

PER CURIAM.

Plaintiff appeals as of right the amended judgment of divorce granting defendant physical custody of the minor child. We affirm.

The parties were married on October 24, 1991, and had one child. Plaintiff filed for divorce on August 31, 1994. At trial, the parties stipulated that the child would temporarily live with defendant but there would be no formal award of custody. The judgment of divorce did not award custody to either party, but stated that the child would live with defendant, pending a doctor's review and evaluation. The trial court subsequently referred the matter of custody and parenting time to the Friend of the Court (FOC). The trial court ordered that if either party appealed the findings of the FOC, the court would limit its review to transcripts of the FOC hearing and any new evidence that had not been introduced at the FOC hearing. In its report, the FOC found that the child had established a custodial environment with defendant and recommended that defendant have sole physical custody of the child. Both parties filed objections to the FOC recommendation.

The trial court conducted a hearing where it heard evidence that had not previously been presented at the FOC hearing. In its opinion and order following the hearing, the trial court stated that, in making its decision, it reviewed "the findings of the Friend of the Court Referee, the testimony of both the Plaintiff and Defendant and the exhibits and transcripts supplied by the parties . . . ." The trial court found that a custodial environment had been established with defendant and awarded physical custody of the child to defendant. Thereafter, the trial court entered an amended judgment of divorce that reflected this decision.

On appeal, plaintiff claims that the trial court erred in determining custody without consideration of the testimony taken at the FOC hearing. Plaintiff's argument presents a question of law that is reviewed for clear legal error. MCL 722.28; *Schoensee v Bennett*, 228

Mich App 305, 312; 577 NW2d 915 (1998). "A court commits legal error when it incorrectly chooses, interprets, or applies the law." *Schoensee, supra.*

If either party objects to the referee's report, the trial court must hold a de novo hearing. MCL 552.507(5); MCR 3.215(E)(3)(b); *Cochrane v Brown*, 234 Mich App 129, 131-134; 592 NW2d 123 (1999). The trial court may not base its decision on its review of the file and transcripts of the FOC hearing without conducting its own de novo hearing. *Id.* However, "[i]f both parties consent, the judicial hearing may be based solely on the record of the referee hearing." MCR 3.215(F)(2). Therefore, absent the agreement of both parties, the FOC's report and recommendation is inadmissible as evidence. *Duperon v Duperon*, 175 Mich App 77, 79; 437 NW2d 318 (1989). "[W]hile the FOC's report and recommendation may not form the basis for the trial court's findings, it may be used to establish a background and context for the proceedings." *Id.*

In the instant case, when the matters of custody and parenting time were referred to the FOC, the trial court ordered that if either party appealed the findings/recommendation of Referee Bolton, the Court would limit its review to transcripts of the hearing conducted by the Referee and any new evidence not introduced at the FOC hearing. Plaintiff objected after the FOC referee recommended that defendant have sole physical custody of the child. At the trial court hearing, the parties stipulated to the previous order of the trial court regarding the trial court's limitation of the review of the matter. Indeed, counsel for plaintiff agreed that the parties should submit summaries of the FOC hearings for the trial court to review:

> [W]e now know that there's approximately 35 audio tapes, which would cost a bloody fortune in time and manpower and actual expense in transcribing that. I am not convinced, having reread the decision of the Referee, that the entirety of those 35 tapes has really been summarized in toto or properly.
>
> To that extent, I would ask the Court that in our summations—our written summations to the Court, that we be allowed to expand or explain where we differ from the findings of the Referee over what she may have left out or misinterpreted.
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> * * *
>
> For judicial economy and for our own—sanity of the Bench and the two attorneys involved, I wouldn't mind summarizing.

"A party is not allowed to assign as error on appeal something which his or her own counsel deemed proper at trial since to do so would permit the party to harbor error as an appellate parachute." *Hilgendorf v St John Hosp & Medical Center Corp*, 245 Mich App 670, 683; 630 NW2d 356 (2001), quoting *Dresselhouse v Chrysler Corp*, 177 Mich App 470, 477; 442 NW2d 705 (1989). Acquiescence to an issue at trial waives that issue for appeal. *Hilgendorf, supra* at 696. Because plaintiff agreed to summarize the FOC transcripts, rather than have the trial court review the actual transcripts, plaintiff waived this issue for appeal.

Next, plaintiff contends that the trial court abused its discretion in failing to order defendant to pay for the transcription of the FOC hearings. We disagree. A trial court has the

discretion to award such fees as are reasonable and necessary, and a trial court's determination in this regard will not be reversed on appeal absent an abuse of that discretion. *Stackhouse v Stackhouse*, 193 Mich App 437, 445; 484 NW2d 723 (1992). An abuse of discretion has been defined as occurring when the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment or the exercise of passion or bias. *Michigan Dept of Transp v Randolph*, 461 Mich 757, 768; 610 NW2d 893 (2000).

During the trial court's hearing on the FOC's recommendation, plaintiff did not argue that defendant should pay for the transcription of the hearings or that the trial court had abused its discretion in denying her motions to have defendant pay for the transcriptions. Therefore, this issue was not preserved for appeal. This Court need not review issues raised for the first time on appeal, although it may do so to prevent manifest injustice. *Herald Co, Inc v City of Kalamazoo*, 229 Mich App 376, 390; 581 NW2d 295 (1998).

If ordered by the trial court, or if stipulated by the parties, a referee must make a transcript of the hearings it held. MCL 552.507(3). "The cost of preparing a transcript shall be apportioned equally between the parties, unless otherwise ordered by the court." MCL 552.507(3). In the instant case, plaintiff failed to cite to any place in the record where she moved to have defendant pay for the transcription of the FOC hearings. Additionally, counsel for plaintiff agreed to submit a summary of the FOC hearings, rather than have the trial court review the transcripts of the hearings. Because counsel for plaintiff agreed that a review of the summaries of the FOC hearings was appropriate, we find that manifest injustice did not arise from the trial court's failure to order defendant to pay for the transcription of the FOC hearings.

Next, plaintiff argues that the trial court violated her right to equal protection by reviewing the case without the FOC transcripts when she could not afford to pay for the transcripts. Plaintiff failed to raise this argument in the trial court. "This Court ordinarily will not consider issues raised for the first time on appeal." *In re RFF*, 242 Mich App 188, 204; 617 NW2d 745 (2000). In her brief on appeal, plaintiff failed to cite any legal authority or factual evidence in support of her argument that she was unable to afford the transcription of the hearings. "A party may not merely announce a position and leave it to this Court to discover and rationalize the basis for the claim." *In re Webb H Coe Marital & Residuary Trusts*, 233 Mich App 525, 537; 593 NW2d 190 (1999). This Court need not address an issue that is given only cursory consideration. *Id.* Therefore, plaintiff waived this issue on appeal.

Plaintiff further contends that the parties stipulated that the trial court would not consider the minor child's residence with defendant during the pendency of the divorce proceedings when determining the custodial environment. Thus, according to plaintiff, the trial court's consideration of the child's residence with defendant when it awarded physical custody was error. We disagree. This is a question of law that is reviewed for clear legal error. MCL 722.28; *Schoensee, supra* at 312.

A stipulation is an agreement, admission, or concession made in a judicial proceeding by the parties or their attorneys. *Staff v Johnson*, 242 Mich App 521, 535; 619 NW2d 57 (2000). Where the parties stipulate to an arrangement that limits one party's rights, that party may not later complain about this restriction on appeal. *Weiss v Hodge (After Remand)*, 223 Mich App 620, 636; 567 NW2d 468 (1997). While stipulations of fact are binding on courts, stipulations of law are not. *Staff, supra* at 535.

In the instant case, the trial court considered the fact that the minor child had been in defendant's care since the parties separated in 1994 as part of its determination that a custodial environment existed with defendant. The following stipulation was placed on the record by the parties during the 1996 trial:

> *Mr. Cohen:* And one of the last things is, we both stipulated that Dr. Faller will make recommendations at the end of a year with respect to issues of custody and visitation at that point and that currently this is going to be classified that the child will be with the father for purposes of living.
>
> *The Court*: Yeah, parenting time.
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> *Mr. Cohen:* But the parenting time—this is a parenting time, and there's no formalization of a custody award based on this.
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> *The Court:* Yeah, I'm going to review at the end of the year.
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> *Mr. Cohen:* That's fine. That's what I understood.

We find that this stipulation was meant to clarify that the court was not making a formal award of custody at that time, but was going to make the formal determination of custody at a later date. Thus, the parties stipulated that the trial court's order granting of parenting time to defendant was not a formal custody award, but merely parenting time, with the formal custody determination to be made later. Moreover, plaintiff failed to indicate anything in the record stating that parenting time would not affect the trial court's determination of the custodial environment. Therefore, we find that the trial court did not err in considering the child's living arrangements with defendant in determining the custodial environment.

Finally, plaintiff argues that a custodial environment should not be established with defendant because of the fraudulent allegations of child sexual abuse against plaintiff. We disagree.

> The custodial environment of a child is established if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered. [MCL 722.27(c).]

To determine the existence of an established a custodial environment, "it makes no difference whether that environment was created by a court order, without a court order, in violation of a court order, or by a court order that was subsequently reversed." *Hayes v Hayes*, 209 Mich App 385, 388; 532 NW2d 190 (1995). A custodial environment may even be created by tricking the other party or by violating an agreement made by the parties. *Moser v Moser*, 130 Mich App 97, 100-101; 343 NW2d 246 (1983). "[T]he focus is on the circumstances surrounding the care of the children in the time preceding the trial, not the reasons behind the existence of a custodial environment." *Hayes, supra* at 388.

Moreover, the record does not support plaintiff's contention that defendant made fraudulent child sexual abuse allegations against plaintiff. The FOC report states that defendant's allegations of child sexual abuse were never proved after extensive assessment by the Family Assessment Clinic. While the trial court disagreed with the FOC by finding that plaintiff was more morally fit than defendant, it did not make any findings regarding whether the sexual abuse allegations were fraudulent. Plaintiff fails to cite to any record evidence that states defendant's claims were proven to be fraudulent.

However, even if defendant's allegations of child sexual abuse were fraudulent, we find that the trial court did not err in finding that the custodial environment existed with defendant. Plaintiff concedes that Michigan case law holds that a custodial environment may be established despite the wrongful actions of one of the parties but argues that this rule should not apply where a party gains the custodial environment by making fraudulent child sexual abuse allegations. However, as discussed in *Hayes*, *supra* at 388, the focus should be on the existence of such an environment and not the reasons behind it. Therefore, a parent's fraudulent child sexual abuse allegations should not be a factor in determining the custodial environment. Rather, the proper place to consider such actions by the parties is when the trial court determines the best interests of the children. *Moser, supra* at 102, n 3.[1] In a case where an established custodial environment exists, one parent's fraudulent allegations of child sexual abuse "may tip the balance in favor of finding that 'clear and convincing' evidence supports a custodial change in the best interests of the [child]." *Id.* Nonetheless, in the instant case, the trial court did not err in finding that the custodial environment existed with defendant.

Affirmed.

/s/ Jessica R. Cooper
/s/ David H. Sawyer
/s/ Donald S. Owens

[1] To the extent that the custodial parent's actions to reflect on his ability to, for example, instill appropriate ethics and honesty in the child, this may be considered pursuant to MCL 722.23(f), (j), or (l). See *Moser, supra* at 102, n 3.